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In the Supreme Court

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OF THE
United States

OCTOBER TERM, 1946

No. 1281

G. E. GRAY, J. C. PITTS, and FLOYD BROWN,

Petitioners,

vs.

COMMODITY CREDIT CORPORATION

(a corporation),

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,

and

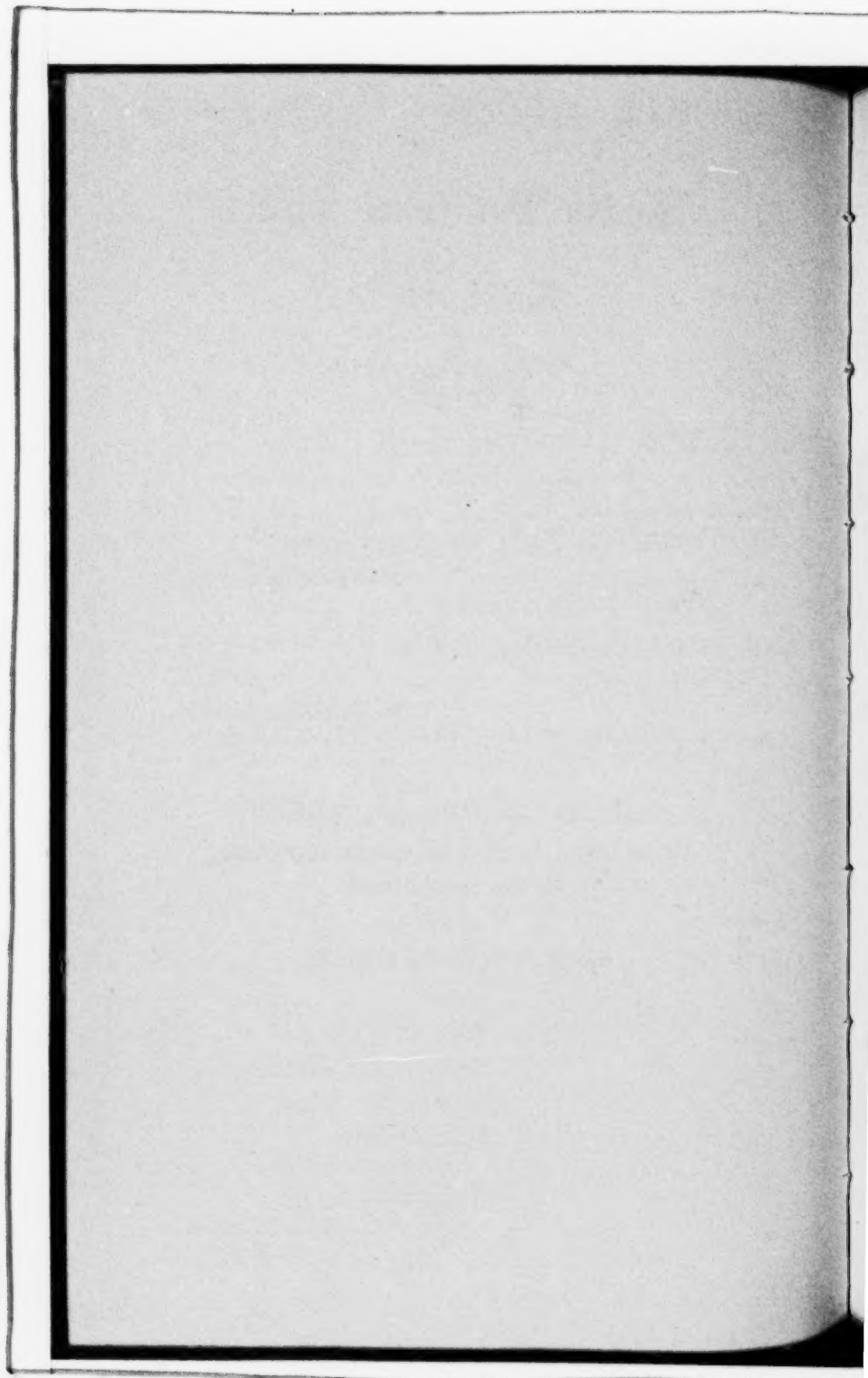
BRIEF IN SUPPORT THEREOF.

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1. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 2. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 3. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 4. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

Test Books

1. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 2. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

Statistics

1. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 2. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

3. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 4. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

5. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 6. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

7. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 8. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

9. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 10. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

11. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 12. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

13. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 14. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

15. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 16. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

17. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.
 18. *Journal of the American Medical Association*, Vol. 1, No. 1, p. 1. 1917.

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No.

G. E. GRAY, J. C. PITTS, and FLOYD BROWN,

Petitioners,

vs.

COMMODITY CREDIT CORPORATION

(a corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Fred M. Vinson, Chief Justice, of
the United States, and to the Honorable Associate
Justices of the Supreme Court of the United
States:*

Petitioners above named respectfully apply for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to review the judgment of the said Court in the cause entitled G. E.

Gray, J. C. Pitts, and Floyd Brown, Appellants v. Commodity Credit Corporation, Appellee, No. 11,287. The following is a summary of the matter involved:

During the season of 1944 the War Food Administrator, by regulation, prohibited the growers of raisin varieties of grapes from making any disposition of their grapes except (1) to convert them to raisins or sell them to dehydrators for such conversion, or (2) to sell them to the Office of Distribution of the War Food Administration, or a corporate agency thereof. The Commodity Credit Corporation was a corporate agency of the Office of Distribution and was authorized to purchase (1) raisin grapes not suitable for making into standard grade raisins (2) substandard grade raisins, and (3) such quantities of raisin variety grapes as the War Food Administration might determine to be in excess of the quantity needed for conversion to raisins. No restrictions were placed on the sale of raisins but the War Food Administration granted no permission for the sale of fresh raisin grapes to any purchaser except the Commodity Credit Corporation. The Commodity Credit Corporation would not purchase such grapes unless the grower would sign a standard form of contract from which no variation was permitted. A support price was fixed for raisins and maintained by the payment of subsidies to the processors. The standard contract for the purchase of fresh grapes and raisins which the Commodity Credit Corporation was authorized to purchase provided for payments on delivery, which were so fixed as to be equivalent to the return which

the growers would have received from the grapes if converted to raisins and sold at the support price. The contract further provided for the sale of such grapes and raisins by the Commodity Credit Corporation and payment from the proceeds of the sale of the sum of \$10.00 per dried ton to all growers who converted their grapes to raisins. After deducting the amount of such payments and the expenses of the sale, the remaining proceeds were to be distributed "pro rata on a fresh tonnage basis" to all growers of raisin variety grapes, including those who converted their grapes to raisins as well as those who sold them to the Commodity Credit Corporation, conversion factors being specified in the contract for the purpose of converting raisin tonnage to fresh tonnage. The Commodity Credit Corporation sold the grapes to wineries and fresh grape shippers at prices approximately double those paid to growers. The \$10.00 payments have been made and the net proceeds are ready for distribution. The Commodity Credit Corporation now interprets the distribution clause of the contract to mean that the producers of all varieties of raisin grapes shall be entitled to share equally according to tonnage in the entire fund, without regard to the variety of grapes which they may have contributed.

The principal varieties of raisin grapes are Muscats and Thompson Seedless. The proportion of the Thompson Seedless crop required for raisins was much greater than the proportion of the Muscat crop required for that purpose. The result is that although the aggregate tonnage of the Thompson Seedless crop

was many times that of the Muscat, more than one-half of the profits made by the Commodity Credit Corporation from the sale of the grapes was derived from the Muscata. If the proceeds from the sale of Muscats were distributed to Muscat growers alone they would receive \$22.49 per ton, but if the entire fund were distributed to all growers at a uniform rate per ton each would receive approximately \$4.83 per ton.

The petitioners represent the Muscat growers and their position is that the distribution of the proceeds of the sale of their grapes to growers of other varieties will deprive them of their property without due process of law. They ask for relief in the alternative, either that the contract be declared by the Court to mean that the proceeds from the sale of each variety shall be distributed only to growers of that variety, or that the contracts be set aside and the proceeds distributed to each grower according to his contribution to the fund.

The case was submitted to the District Court on an agreed statement of facts and judgment was rendered for the defendant on all points, and affirmed by the Circuit Court of Appeals.

This Court has jurisdiction to review the judgment in question by virtue of the provisions of Subdivision (a) of Section 347 of Title 28 of the U. S. Code, which provides that in any case, civil or criminal, in a circuit court of appeals, it shall be competent, upon the petition of any party thereto, to require by certiorari,

either before or after the judgment or decree by such lower Court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. The judgment in question was entered by the Circuit Court of Appeals on the 28th day of January, 1947.

The questions presented are the following:

1. Will the Muscat grape growers be deprived of their property without due process of law by the payment of a part of the proceeds of the sale of their grapes to growers of other varieties?

2. Is there provision implied in the contract that the net proceeds of the sale of the grapes shall be segregated according to the variety of grapes from which they are derived, so that the proceeds of the sale of each variety shall be paid only to producers of that variety.

3. Are the petitioners estopped to set up the invalidity of the contracts by reason of having accepted the payments made upon delivery of grapes under the contracts?

The last two questions are incidental and relate to the matter of relief which can be granted to the petitioners rather than to the principal question involved, which is, in substance, whether or not the producers of a given commodity may be required, by the action of an agency of the federal government in closing other channels for the distribution of their product, to enter into a contract which provides for the sharing

of the proceeds of the sale of the product with producers of some other commodity. That is an important question of federal law which has not been, but should be decided by this Court, and which has been decided by the Court below in a way probably in conflict with applicable decisions of this Court. (*Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. ed. 510, 57 S. Ct. 364; *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 240.)

Dated, Fresno, California,

April 16, 1947.

DENVER S. CHURCH,

DAVID E. PECKINPAH,

HAROLD M. CHILD,

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ROGER R. WALCH,

Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**I.**

THE COMPULSORY SALE OF PRIVATE PROPERTY TO A GOVERNMENT AGENCY IS A TAKING OF SUCH PROPERTY WITHIN THE MEANING OF THE 5TH AMENDMENT.

On July 20, 1944, the War Food Administration issued an amended order known as War Food Order No. 17, a copy of which is attached hereto as an appendix. The effect of this order was to prohibit the sale of fresh grapes of the varieties mentioned in the order, to-wit: Muscat, Thompson, Seedless, Sultana and Zante Currant, without a permit from the Director of Distribution. With minor exceptions which are not material here, the Director refused to authorize the sale of any fresh grapes of those varieties except to the Commodity Credit Corporation, which is a corporate agency of the Office of Distribution. (R. 63.) The Commodity Credit Corporation purchased only grapes and raisins in the following categories: (a) raisin variety grapes not suitable for conversion into standard quality raisins; (b) damaged or substandard quality raisins, and (c) such quantities of raisin variety grapes as might be produced in excess of the amount determined by the War Food Administrator to be needed for conversion to raisins. It purchased such grapes or raisins from a grower only if he signed a printed contract in a standard form, and it would not accept signatures under protest or changes in the printed terms of the contract. (R. 64.) The printed form provided only for the sale of grapes

or raisins in the categories above mentioned. (R. 92, 9.) The price paid the growers for fresh Muscat grapes was \$50.00 per ton. That price was calculated to give the grower the same return as he would have received for his grapes if sold to a dehydrator or dry-yard operator, or if he had converted them into natural condition raisins and sold them as such. (R. 72.) The Commodity Credit Corporation sold the Muscat grapes for \$100.00 per ton. (R. 74.)

It is an established principle of constitutional law that in determining whether the limits of authority have been exceeded the Courts will not regard mere forms, but will look through forms to the substance of things. (*Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 S. Ct. 273.)

It is also a well established principle of constitutional law that a power which is granted by the constitution cannot be used as a means to secure an end which is prohibited. (*Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Western Union Tel. Co. v. Foster*, 246 U. S. 105, 62 L. ed. 1006, 38 S. Ct. 438, 1 A.L.R. 1278; *Union Pac. RR. Co. v. R.R. Commission*, 248 U. S. 67, 61 L. ed. 131, 39 S. Ct. 24; *Fidelity and Deposit Co. v. Tafoya*, 270 U. S. 426, 70 L. ed. 664, 46 S. Ct. 331; *Frost v. R.R. Commission*, 271 U. S. 283, 70 L. ed. 1101, 46 S. Ct. 605.)

Here the power of the War Food Administration to require the conversion of grapes to raisins in order to increase their usefulness as food is not open to

question, but the power was used for the purpose of obtaining title through a government agency to the surplus grapes which were not required for conversion to raisins.

II.

PRIVATE PROPERTY CANNOT BE TAKEN EXCEPT FOR PUBLIC USE.

The surplus was not taken for public use, but for sale by the Commodity Credit Corporation through the ordinary private commercial channels. The Fifth Amendment prohibits the taking of private property for public use without just compensation, and that implies that private property cannot be taken for other than public use, even when just compensation is made. (*Cole v. LaGrange*, 113 U. S. 1, 28 L. ed. 896, 5 S. Ct. 416; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L. ed. 510, 57 S. Ct. 364.) To take private property for the purpose of selling it at a profit for the benefit of the public treasury or some other private individual would be a peculiarly odious form of tyranny.

There are numerous decisions of this Court in cases in which both Congress and the States have attempted, by the exercise of powers which they undoubtedly possessed, to accomplish the ulterior purpose of benefiting some private individual or individuals at the expense of others. Among the powers which it has been held could not be thus misused are those of taxation (*Citizens Savings & Loan Assn. v. Topeka*, 20

Wall. 655, 22 L. ed. 455; *U. S. v. Butler*, 297 U. S. 1, 80 L. ed. 477, 52 S. Ct. 312), of fixing the boundaries of drainage districts (*Myles Salt Co. v. Board of Commissioners*, 239 U. S. 478, 60 L. ed. 392, 36 S. Ct. 204, L.R.A. 1918E 190), regulating common carriers (*Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 S. Ct. 130; *Chicago St. P. M. & O. Ry. Co. v. Holmberg*, 282 U. S. 162, 75 L. ed. 270, 51 S. Ct. 56; *R. R. Retirement Board v. Alton R.R. Co.*, 295 U. S. 330, 79 L. ed. 1468, 55 S. Ct. 240), and regulating the production of natural gas (*Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 81 L. ed. 510, 57 S. Ct. 364.)

III.

PAYMENT OF PROCEEDS OF THE SALE OF MUSCAT RAISINS TO GROWERS OF OTHER VARIETIES IS A TAKING OF THE PROPERTY OF MUSCAT GROWERS FOR THE PRIVATE BENEFIT OF OTHER PERSONS.

The State of California has an agricultural prorate law which has been upheld by this Court and the Supreme Court of the State, and, in *U. S. v. Rock Royal Co-op.*, 307 U. S. 533, 83 L. ed. 1446, 59 S. Ct. 993, this Court approved the compulsory pooling of the proceeds of milk when sold at varying prices for different purposes, such as table milk, cream, butter, cheese, etc., where it appeared that the return to the producer varied with the use for which the milk was purchased. In view of this decision we have accepted as proper the pooling of the proceeds from the sale of surplus raisin variety grapes to the wineries and fresh

grape shippers with the proceeds from the sale of raisins, in order to equalize the burden of furnishing food for the support of the war effort, but that does not justify the distribution of the proceeds of the sale of different varieties from a common pool at a uniform rate per ton.

The compulsory pooling of agricultural products for marketing purposes has been accepted in principle, but there has yet been no decision in a case where the participants in the pool complained that they were deprived of their property without due process of law by reason of the method adopted for the distribution of the net proceeds. This is a case of first impression upon that point and calls for a definition of the rules by which such distribution must be governed if it is to conform to the requirements of the Fifth and Fourteenth Amendments. The District Court dismissed the question with the suggestion that no individual had any right to complain of the compensation received for his property so long as the lives of others were being sacrificed in war, and the Circuit Court of Appeals adopted the opinion of the lower Court. That approach to the question is more emotional than realistic, since this Court has never sanctioned departure in time of war from the rules which govern the taking of private property in time of peace. The methods of taxation, condemnation and requisition are the same in war as in peace.

When it is carried out with due respect to constitutional limitations, compulsory pooling for marketing purposes is not necessarily a taking of property,

but may be accepted as regulation of commerce, and in some instances the administration of the pool through a government agency may be accepted as a proper means of regulation. But regulation ends and taking of property without due process of law begins when the proceeds derived from the sale of one man's property are given to another. The validity of laws and regulations requiring marketing through governmentally operated pools is dependent upon classification of commodities according to variety, quality and grade, so that only producers of like commodities share in a common fund. If, for example, the proceeds of the sale of wheat and corn were placed in a common pool and distributed to the producers of both at a uniform rate per bushel, it is evident that the producers of wheat would be deprived of their property without due process of law, because a bushel of wheat is always worth more than a bushel of corn. The present case calls for the application of the same principle, but there are two complicating factors which tend to introduce confusion in the application of the principle to this case. First, it has been deemed proper to require the division of the surplus fund upon an equal basis between those who dried their grapes and those who sold them fresh, in order to place those whose grapes were selected by the War Food Administration for the production of essential food upon an equality with those whose grapes were not so selected. Secondly, an arbitrary differential of \$7.00 per ton was paid for fresh Muscats over and above the price paid for the Thompsons and Sultanas.

The four varieties of grapes which were included in the provisions of War Food Order No. 17 differ widely in their adaptability to the principal uses to which raisin variety grapes are put, namely, raisin, wine and table use. The Zante Currant, which is not a true currant but a grape, is used only for raisins. The Thompson Seedless is used for all three purposes, but predominantly for raisins. The Muscat and Sultana varieties are used both for wines and raisins, but the quantity of those varieties used for raisins is much smaller both absolutely and in relation to total production than the Thompsons. (R. 49, 50, 58.) Consequently, in 1944, when the War Food Administrator found it necessary to utilize the war powers of the government to procure the necessary supply of raisins, he took for that purpose all of the Zante Currants, 92.6% of the Thompson Seedless crop, 55.6% of the Sultana, and 52.7% of the Muscat. (R. 59.) In this he acted reasonably and the proportion of the respective crops which he required to be converted to raisins was not the result of accident or caprice, but was fixed in response to the public need. The injustice of requiring the Muscat growers to compensate the Zante Currant growers for converting their grapes to raisins when they could not have used them for anything else is at once apparent. Similarly, the fact that the War Food Administration required the Thompson Seedless growers to devote such a large proportion of their crop to the less profitable use fails to furnish any logical reason for compelling the producers of some other commodity to help make good the loss.

During the last three years before the United States entered the war and before any controls were in force, the percentages of the total crops of the respective varieties (exclusive of Zante Currants) used for raisins were as follows:

	<u>Muscat</u>	<u>Sultana</u>	<u>Thompson</u>	
1939	44.8	62.3	81.2	(R. 49)
1940	12.	25.2	64.5	(R. 49)
1941	16.7	22.3	64.5	(R. 50)

In 1944 the proportion of Muscats used for raisins was more than three times that used in the last year of uncontrolled marketing, while the proportion of the Thompson Seedless used for that purpose was increased by less than 50%. Certainly the Thompson growers could not justly claim compensation from the Muscat growers on account of being more unfavorably affected by the government control program.

It was, of course, to be anticipated that the compulsory drying program would disturb the normal balance between the prices offered for raisin variety grapes for their various uses and create a wide gap between the prices received for raisins and for fresh grapes. The purpose of pooling the excess and distributing it on an equal basis to those who sold their grapes fresh and those who converted them to raisins was to avoid a situation in which it would be relatively disadvantageous for a grower to dispose of his grapes in raisin channels; to eliminate any financial incentive to divert grapes from raisin channels; to avoid the possibility that a grower whose grapes were devoted

to the essential raisin use would derive smaller financial return than one whose grapes were devoted to the less important non-raisin use, in consequence of the market price differential favoring non-raisin uses. (R. 65, 66.)

All this is sound enough when applied as between growers of the same variety of grapes, but it is obvious that the higher price of fresh Muscat grapes could furnish no financial incentive for a grower of Thompson Seedless to divert his grapes from raisin channels, nor could it subject him to any disadvantage in converting his grapes to raisins or make it possible for one Thompson grower to obtain a greater financial return than another. The return being equalized as between growers of the same varieties, the result of further equalizing it as between the different varieties would be to impose an equal burden upon all the growers of Muscats whether they converted their grapes to raisins or not, and to benefit equally the growers of the other varieties without regard to their sacrifice to the war effort. It could contribute to no public purpose, but would serve merely to equalize wealth between individuals upon communistic principles, in violation of our constitutional guaranty of the right of private property.

Under the standard form contracts the Commodity Credit Corporation paid for fresh Muscat grapes on delivery \$7.00 per ton more than it paid for Thompsons and Sultanas. According to the view taken by the Circuit Court of Appeals, the payment of this arbi-

trary differential in price fully compensated the Muscat growers for any difference in value between their grapes and those of other varieties and satisfied the requirement of due process of law. That presupposes that the constitutional requirement could be satisfied by payment of just compensation, but that is true only when property is taken for public use. Here the property was not taken for public use and the authority of the government was limited to regulating the channels of distribution. It had no power to appropriate the proceeds of the operation to its own use or to the use of any private individual, but could only return such proceeds to the owners of the property taken, less the reasonable cost of distribution. The owner cannot be required to accept compensation, however just it may be, but is entitled to the identical sum received by the government for his property, less the necessary expenses.

IV.

THE CONTRACT CAN BE SO INTERPRETED AS NOT TO DEPRIVE THE MUSCAT GROWERS OF ANY SUBSTANTIAL RIGHT.

As we interpret the decision in the *Rock Royal* case, the Muscat growers will not be deprived of any substantial right if the portion of the funds in the hands of the Commodity Credit Corporation which was derived from the sale of Muscats is distributed in proportion to fresh tonnage to those Muscat growers who converted their grapes to raisins, as well as to those

who sold them fresh, since fresh Muscat grapes are convertible to Muscat raisins. Petitioners believe that the contracts can be so interpreted as to permit that method of distribution. The standard form contract, after providing for the payment of the cost of the grapes and raisins and the incidental expenses of the sale, and the payment of \$10.00 per ton to all producers of raisins, proceeds as follows:

"The balance of the fund, if any, will be distributed pro rata on a fresh tonnage basis to all growers of raisin variety grapes * * *." (R. 14.) The contracts were made in California (R. 71, 66) and the California Civil Code (Sec. 1655) provides as follows: "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention."

Webster's New International Dictionary defines "pro rata" as "in proportion; proportionately; according to share, interest or liability of each," and "basis" as, "the principal component part of a thing; the ground work; the first or fundamental principle". To distribute the fund pro rata on a fresh tonnage basis to all growers is to distribute it according to the share or interest of each, fresh tonnage being the principal component part or ground work of the plan of distribution. It does not exclude classification of the participants into groups having separable interests, and division of the fund according to such classification.

In *Robinson v. Booth-Orchard Grove Ditch Co.*, 94 Colo. 515, 31 Pac. (2d) 487, the Supreme Court of the state had before it a statute providing for assessments by irrigation companies "to be levied pro rata on the shares of stock". The Court said: "Where stock, as here, is divided into different classes, each entitled to a different use, and varying, therefore, in benefits from maintenance, the pro rata mandate requires only that costs shall be equitably proportioned between the classes and that the assessment on each share in a given class be the same."

That case is authority for the proposition that where, in a pooling scheme such as that involved in this case, several different varieties are involved, the provision for pro rata distribution requires that the proceeds be divided among the different varieties according to the amount contributed by each and that the payment for each unit of a given variety be the same. While that case is the only one we have been able to find directly involving a similar use of the words "pro rata", the proposition seems to be too well grounded in reason and commercial usage to be successfully disputed.

V.

PETITIONERS ARE NOT ESTOPPED BY ACCEPTANCE OF PAYMENTS ON DELIVERY.

The defense of estoppel applies only to the alternative request for a rescission of the contract and is not available with respect to the question of its interpreta-

tion. If the Court should determine the question of interpretation according to the contention of petitioners, judgment for petitioners would necessarily follow, even though they might have been estopped to claim a revocation of the contracts in the event that the question of interpretation were determined against them.

But, even as against the claim of rescission of the contracts, the defense of estoppel upon the ground of acceptance of benefits by petitioners is not available under the circumstances of this case. The principle that one who accepts the benefit of a statute or regulation waives the right to question its validity applies only when such acceptance is voluntary. (11 Am. Jur. 767.) Acceptance is not voluntary, where non-compliance will result in the loss of a valuable right. (*Home Ins. Co. v. Morse*, 20 Wall. 455, 22 L. ed. 365; *A. T. & S.F. R.R. Co. v. O'Conner*, 223 U. S. 280, 56 L. ed. 436, 32 S. Ct. 216; *Union Pac. R.R. Co. v. R.R. Commission*, 248 U. S. 67, 63 L. ed. 131, 39 S. Ct. 24; *Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 690, 51 S. Ct. 252; *U. S. v. Butler*, 297 U. S. 1, 80 L. ed. 477, 52 S. Ct. 312.) The influence of the duress must be removed before the conduct becomes voluntary, and, after that, acts charged as constituting an affirmance must be such as to indicate an intention to condone the wrong and the purpose to abide the consequences. (13 C. J. 625.)

The grapes which the petitioners sold to the Commodity Credit Corporation were surplus which had been determined by the War Food Administrator to

be in excess of the quantity required for conversion to raisins. To require them to be converted to raisins would be in excess of the war powers granted by Congress, and to prohibit their sale altogether would be a plain violation of the 5th Amendment. Yet, those were the two alternatives from which the grower must choose if he refused to sign the contract with which he was presented when he sought to avail himself of the privilege of selling to the Commodity Credit Corporation. That was compulsion and if it was applied for the purpose of compelling him to surrender a right guaranteed by the constitution, it constituted duress as defined in the decisions above cited. The contract provided for payments to be made when the weight of the delivered grapes was ascertained (R. 13), and acceptance of such payments was prompted by the same necessity which dictated the signing of the contract and the delivery of the grapes. It was the only means of obtaining money for the crop.

It was contended that petitioners were estopped because two of them converted part of their grapes to raisins and accepted the payments which the contract required to be made on account of such conversion. Those payments were not made to them on account of the grapes which they sold to the Commodity Credit Corporation, but were payments which the contracts required them to make for the benefit of growers of other grapes. They would be entitled to such payments whether they signed the contracts or not. Consequently, accepting them would not be an affirmance of the contracts nor could acceptance by

two of them estop the third, who received none. It could not justify the judgment which was entered denying all relief.

CONCLUSION.

The District Court and the Circuit Court, which adopted its opinion, made the error of considering the action of the War Food Administration only as regulation and overlooked the distinction between regulation and the taking of property. Regulation complies with the constitutional requirement of due process of law if it is based upon reason, but the taking of private property by the government, except for public use, is absolutely prohibited. Compulsory sale of private property to an agency of the government for resale in the ordinary course of trade may be a regulatory measure if the profits made on the resale are returned to the original vendor, but if they are appropriated to the use of the government or some private individual other than the owner, it is confiscation. The rule that the Court looks beyond the form to the substance of the transaction, in determining whether or not a constitutional limitation of power has been exceeded, is necessary to prevent the breaking down of the barriers of the Bill of Rights by gradual stages. The idea of compulsory pooling of agricultural products for marketing purposes, as exemplified in the Agricultural Marketing Agreement Act and the California Prorate Act, is of comparatively recent origin and no one can forecast its future.

It might be extended to other fields than agriculture. The decision of the Court below squarely holds that all a participant in such a pool is entitled to receive is reasonable compensation for his property and that if he is paid such a price as may appear to be reasonable when his property is delivered to the pool, all the proceeds derived from the operation of the pool belong to the state, to dispose of in such manner as it may consider just. The producer must accept such compensation as the state may fix, although his property is not taken for public use and may be disposed of through private channels at a profit for the benefit of other persons. This doctrine is a stranger to our constitutional system and its rejection is imperative.

The petition for a writ of certiorari should be granted so that this important question may receive a final decision.

Dated, Fresno, California,
April 16, 1947.

Respectfully submitted,

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(Appendix Follows.)

Appendix

WAR FOOD ADMINISTRATION

(WFO 17, Amdt. 5)

Part 1407 - - - Dried Fruit.

RAISIN VARIETY GRAPES, ZANTE CURRANT GRAPES, RAISINS, AND ZANTE CURRANTS.

War Food Order No. 17, as amended, 9 F.R. 4321, 4319 (formerly designated as Food Distribution Order No. 17, as originally issued by the Secretary of Agriculture on January 30, 1943, and as amended, 8 F.R. 1706, 12042), is further amended to read as follows:

1407.2 *Restrictions relative to raisin variety grapes. Zante currant grapes, raisins, and Zante currants—*

(a) *Definitions.* (1) "Person" means any individual, partnership, corporation, association, business trust, or any organized group of persons, whether incorporated or not.

(2) "Director" means the Director of Distribution, War Food Administration.

(3) "Raisin variety grapes" means Thompson Seedless, Muscat, and Sultana grapes, grown in Fresno, Kern, Kings, Madera, Merced, Stanislaus, San Joaquin, or Tulare Counties in the State of California, in the fresh or partially dried form.

(4) "Zante currant grapes" means the grapes of the Zante currant variety, grown in Fresno, Kern, Kings, Madera, Merced, Stanislaus, San Joaquin, or

Tulare Counties in the State of California, in the fresh or partially dried form.

(5) "Raisins" means raisin variety grapes preserved by the removal of a part of the natural moisture, and includes such fruit in the processed or unprocessed condition.

(6) "Zante currants" means Zante currant grapes preserved by the removal of a part of the natural moisture, and includes such fruit in the processed or unprocessed condition.

(7) "Processing" means grading, sizing, stemming, seeding, or treating raisins or Zante currants by the use of water, steam, chemicals, or compressed or hot air.

(8) "Producer" means any person engaged in the production of raisin variety grapes or Zante currant grapes; and such term includes, but is not limited to, any owner of such grapes at the time of the harvesting or picking of such grapes.

(9) "Packer" means any person engaged in the business of processing and packaging raisins or Zante currants.

(10) "Dehydrator" means any person engaged in the business of drying raisin variety grapes or Zante currant grapes by the use of artificial heat or by sun drying.

(b) *Restrictions.* (1) No producer may sell or deliver any raisin variety grapes or any Zante currant grapes, except (i) the Office of Distribution (in-

cluding, but not being limited to, any corporate agency thereof), or (ii) any person designated by the Director, or (iii) any dehydrator for the purpose of converting such grapes into raisins or Zante currants. No producer may, unless specifically authorized by the Director, use more than 100 pounds of raisin variety grapes or Zante currant grapes during each calendar year for any purpose other than for conversion into raisins or Zante currants.

(2) No person may, unless specifically authorized by the Director, purchase or accept delivery of any raisin variety grapes or any Zante currant grapes for any purpose other than for conversion into raisins or Zante currants.

(3) No person may, unless specifically authorized by the Director, purchase, accept delivery of, or use any raisins or any Zante currants for conversion into alcohol, brandy, wine, or other beverage (whether alcoholic or not), any concentrate, any syrup, or any non-food product or non-food byproduct.

(4) No person may sell any raisins or any Zante currants for conversion into alcohol, brandy, wine, any other beverage (whether alcoholic or not), any concentrate, any syrup, or any non-food product or non-food by-product except to (i) the Office of Distribution (including, but not being limited to, any corporate agency thereof), or (ii) any person designated by the Director.

(5) On March 1 of each year each person, other than a packer, shall, without regard to existing con-

tracts, set aside for delivery to the Office of Distribution, or any person designated by the Director, all of the unprocessed raisins produced in the then immediately preceding calendar year, or owned by or under contract to, such person on said date, and hold such unprocessed raisins so set aside for a period of one year thereafter unless, during such period, said unprocessed raisins are acquired by the Office of Distribution or a person designated by the Director.

(6) No person may sell or deliver any raisin variety grapes, any Zante currant grapes, any raisins, or any Zante currants with knowledge or reason to believe that such quantity, or any portion thereof, thus sold or delivered is to be used in violation of this order.

(7) No dehydrator shall convert any raisin variety grapes into raisins by any method other than sun drying, unless specifically authorized by the Director.

(c) *Audits and inspections.* The Director shall be entitled to make such audit or inspection of the books, records and other writings, premises or stocks of raisin variety grapes, Zante currant grapes, raisins, and Zante currants of any person, and to make such investigations, as may be necessary or appropriate, in the Director's discretion, to the enforcement or administration of the provisions of this order.

(d) *Records and reports.* (1) The Director shall be entitled to obtain such information from, and require such reports and the keeping of such records by, any person, as may be necessary or appropriate,

in the Director's discretion, to the enforcement or administration of the provisions of this order.

(2) Every person subject to this order shall, for at least two years (or for such period of time as the Director may designate), maintain an accurate record of his transactions in raisin variety grapes, Zante currant grapes, raisins, and Zante currants.

(e) *Petition for relief from hardship.* Any person affected by this order who considers that compliance herewith would work an exceptional or unreasonable hardship on him may file a petition for relief with the Order Administrator. Such petition shall be addressed to Order Administrator, War Food Order No. 17, Fruit and Vegetable Branch, Office of Distribution, War Food Administration, Washington 25, D. C. Petition for such relief shall be in writing and shall set forth all pertinent facts and the nature of the relief sought. The Order Administrator may take any action with reference to such petition which is consistent with the authority delegated to him by the Director. If the petitioner is dissatisfied with the action taken by the Order Administrator on the petition, he shall obtain, by requesting the Order Administrator thereof, a review of such action by the Director. The Director may, after said review, take such action as he deems appropriate, and such action shall be final. The provisions of this paragraph (e) shall not be construed to deprive the Director of authority to consider originally any petition for relief from hardship submitted in accordance herewith. The Director may consider any such petition and take

such action, with reference thereto that he deems appropriate, and such action shall be final.

(f) *Violations.* Any person who violates any provision of this order may, in accordance with the applicable procedure, be prohibited from receiving, making any deliveries of, or using the material subject to priority or allocation control pursuant to this order. In addition, any person who wilfully violates any provisions of this order is guilty of a crime and may be prosecuted under any and all applicable laws. Further, civil action may be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this order.

(g) *Delegation of authority.* The administration of this order and the powers vested in the War Food Administrator, insofar as such powers relate to the administration of this order, are hereby delegated to the Director. The Director is authorized to redelegate to any employee of the United States Department of Agriculture any or all of the authority vested in him by this order.

(h) *Communications.* All reports required to be filed hereunder and all communications concerning this order shall, unless otherwise provided herein or in instructions issued by the Director, be addressed to the Director of Distribution, War Food Administration, Washington 25, D. C., Ref. WFO-17.

(i) *Effective Date.* This order shall become effective at 12:01 A.M. p.w.t., July 21, 1944. With respect to violations, rights accrued, liabilities incurred,

or appeals taken under said War Food Order No. 17, as amended, prior to the effective time of the provisions hereof, the provisions of said War Food Order No. 17, as amended, in effect prior to the effective time hereof shall be deemed to continue in full force and effect for the purpose of sustaining any proper suit, action, or other proceeding with regard to any such violation, right, liability, or appeal.

(E.O. 9280, 7 F.R. 10179; E.O. 9322, 8 F.R. 3807; E.O. 9334, 8 F.R. 5423; E.O. 9392, 8 F.R. 14783.)

Issued this 20th day of July 1944.

Ashley Sellers,
Acting War Food Administrator.